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No. 89-1816

In The

Supreme Court of the United States

October Term, 1989

USX CORPORATION,

Petitioner,

v.

ELBERT G. GREEN and ROBERT DANLEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether on remand the Court of Appeals' ruling that plaintiffs identified subjective interviews and proved that those interviews had a disparate impact on qualified black applicants satisfied the requirements of *Wards Cove Packing Co. v. Atonio,* 109 S. Ct. 2115 (1989).

2. Whether on remand the Court of Appeals' ruling that USX failed to produce any substantial evidence that there was a business justification for its discriminatory subjective interviews satisfied the requirements of *Wards Cove.*

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Elbert G. Green and Robert Danley, individually and as representatives of a class of persons similarly situated, respectfully ask this Court to deny the petition of USX Corporation for a writ of certiorari to review the February 23, 1990 remand ruling of the United States Court of Appeals for the Third Circuit.

COUNTERSTATEMENT OF THE CASE

This Title VII class action was filed in 1976 on behalf of about 12,000 black men and women who sought,

without success, unskilled laborer jobs at the Fairless Hills, Pennsylvania, steel plant of USX Corporation ("USX"). LFF 1 (69a).[1] The plaintiffs' qualifications for those jobs were at least as good as those of white applicants. LFF 63 (87a). Nonetheless, in the process of hiring thousands of laborers, USX rejected a disproportionately large number of qualified blacks, using a subjective interviewing process described by the courts below as "bizarre" and "unseemly." (51a).

When USX (then United States Steel Corporation) opened its large steel-making plant at Fairless Hills in the early 1950s, race discrimination in employment was widely practiced in this country. Despite passage of the Civil Rights Act of 1964, USX's work force at Fairless Hills continued throughout the 1970s to be over 91% white. LFF 82 (92a). The EEOC and the Attorney General of the United States sued USX in 1974 alleging a pattern and practice of race discrimination in violation of Title VII and Executive Order 11246. To settle that suit, USX entered into two consent decrees which permanently enjoined the company from discriminating in employment on the basis of race; restricted its use of unvalidated employee selection criteria; and prohibited destruction of hiring records for at least three years. LFF 42, 52 (80a, 82a). This class action was filed two years later.

During the 1970s USX's business prospered. Between 1972 and 1982, the company hired over 5,000 people to

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[1] As used herein, "LFF" refers to findings of fact in the District Court's liability decision; "Tr. I" refers to the liability trial transcript; and "(___a)" refers to a page from the opinions included in the appendix to USX's Certiorari Petition.

work as unskilled laborers, the most menial job in the Fairless Hills plant. LFF 60 (86a). Ninety percent of USX's laborer hiring during those years occurred in 1972, 1973, 1974, 1978 and 1979.[2] LFF 61 (86a).

To be hired as an unskilled laborer, USX required only that an applicant be at least 18 years old, able to read basic safety signs, and able to pass a physical exam. LFF 17 (73a). Indeed, in newspapers USX advertised the job as requiring nothing more than "common sense and a desire to work"; "no experience" was required. LFF 18 (74a). Black and white applicants possessed these modest requirements equally. LFF 17 (73a). USX expected newly hired laborers to acquire skills through on-the-job training or classroom instruction furnished by USX. LFF 18 (74a).

When any department at USX's steel plant needed unskilled laborers, the department foreman would submit a requisition to the personnel office. LFF 32 (77a). Personnel clerks would then call applicants in for interviews. *Id.* After a preliminary meeting in the personnel office,

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[2] USX did virtually no hiring in 1975, 1980 and 1981. LFF 61 (86a). In 1976, USX faced Title VII suits, numerous EEOC charges of race discrimination, and close government scrutiny resulting from the consent decrees it had executed. The District Court found that to counter these pressures, USX deliberately increased the ratio of blacks it hired that year as laborers. LFF 52 (82a-83a). The qualifications of blacks applying that year were not better than in other years. *Id.* However, after 1976 USX again subjected qualified blacks to overwhelming employment barriers. As the trial court noted, "when the pressure to meet consent decree goals lessened after 1976, the rate of black hires quickly sank back nearly to its former level." (119a).

laborer applicants were sent to the department foremen for final interviews.[3] USX's foremen had unfettered power to accept or reject any applicant on the basis of "gut level" reactions developed in those final interviews. LFF 35 (78a); (117a).

USX claimed that during interviews its foremen assessed over twenty amorphous factors, many of which are not reflected in the applications, including "attitude," "initiative," "personality," "alertness," "intelligence," and "interest." LFF 39 (79a); (114a). Significantly, USX's own employment manual unequivocally banned the use during hiring of factors like "alertness" and "general ability." LFF 41 (80a). Moreover, the District Court found that the foremen were never "trained in any way as to what the different criteria meant or how to implement them uniformly." LFF 39 (79a). Although the consent decrees which settled the United States Government's Title VII suit specifically barred USX's use of unvalidated hiring criteria,[4] USX never examined whether the way its criteria were being interpreted correlated with job performance. LFF 42 (80a).

When any applicant was rejected during an interview, USX's personnel manual required the interviewer to

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[3] The USX Petition (at 14 n.25) suggests that the preliminary interview in the personnel office was qualitative. The testimony of USX employees at trial disclosed that the function of the personnel office interview was to insure that the application was complete, and to describe the job, determine whether the applicant was interested in the position, and answer questions regarding pay, hours, benefits and so on. Tr. I 301-02.

[4] *See also* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607 (1989).

complete a special "Reviewer's Remarks" form to "substantiate conformity with the code of nondiscriminatory treatment . . . of applicants" and to provide "a later justification of selection should it be questioned." LFF 43 (80a). The District Court found that USX and its foremen "largely ignored" this requirement. *Id.*; (117a). Moreover, in violation of its consent decree obligations and EEOC requirements, USX destroyed the few "Reviewer's Remarks" forms that had been prepared after interviews. *Id.* As a result, the foremen at USX never had to justify why they favored white applicants over blacks.[5]

The evidence at trial showed that USX's unreviewed subjective interviews generated shocking racial imbalances. Qualified black men and women submitted 26% of the 50,000 applications considered for laborer jobs during the decade. LFF 58 (85a). The percentage of interviewees who were black (25% to 30%) was consistent with the percentage of blacks submitting applications. *See* discussion *infra* at 14. However, of the 5,000 unskilled laborers USX hired during the five most active years, only 16% were black.[6] LFF 60 (86a).

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[5] The company improperly destroyed many other important employment documents, too. USX threw out 16,000 applications submitted by unsuccessful candidates between 1971 and 1975, when almost two-thirds of the class period hiring occurred. LFF 49, 50 (81a-82a). USX also destroyed the Job Applicant Log for 1972, LFF 57 (84a), and most of the Daily Call-In Logs showing the race of individuals scheduled for interviews. Tr. I 254-5.

[6] USX inaccurately contends that the "overwhelming majority" of blacks rejected during a foreman interview were

(Continued on following page)

The hiring disadvantage blacks suffered at USX was extraordinary. A white applicant for the laborer job enjoyed a 72% "edge" over an equally qualified black applicant. LFF 68, 119 (88a, 104a). If USX had hired in an even-handed way, more than 400 additional blacks would have been employed as laborers during the years in dispute. LFF 69 (89a). This "shortfall" had a statistical value more than 14 standard deviations below what one would expect if the employment decisions were neutral, which translates into less than one chance in 100,000 that USX's black hiring shortfall occurred by chance. *Id.*

After years of discovery and weeks of trial, USX was found liable for race discrimination. The trial court, and the Court of Appeals twice, concluded that USX's wholly subjective interviewing process discriminated against blacks under the disparate impact test of Title VII. Substantial monetary and injunctive relief was awarded to the class.

(Continued from previous page)

then sent to be interviewed, and were hired, by another foreman. USX Petition at 4 n.6. The District Court's factual findings are to the contrary – the USX personnel office only "sometimes" reviewed the reasons why a black applicant was rejected and only "possibly" referred the applicant for a second foreman interview. LFF 35 (78a). The trial court did not find that the "overwhelming majority" or any other number were actually hired by USX, and the statistics prove this could not be true, for if it were the percentage of blacks hired would have been on a par with the percentage of blacks interviewed (25% to 30%).

REASONS FOR DENYING THE WRIT

This fourteen-year old case does not merit a writ of certiorari. No unsettled question of federal law is presented. The Third Circuit was not, as USX claims, a renegade on remand; its unanimous decision comports with *Wards Cove* in every way. There is no split among the Circuit Courts on the issues this case presents. The analysis of USX's liability under Title VII is intensely factual.

For years, USX's principal defense in the courts below was that the disparate impact test could not be used to challenge its subjective hiring. Both the trial and appellate courts disagreed. In *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 991 (1988), this Court, too, ruled that "subjective or discretionary employment practices may be analyzed under the disparate impact approach . . . . "

USX then claimed that the plaintiffs had neither identified subjective interviews as an employment practice they were attacking nor established that the interviews caused the disproportionate exclusion of blacks.

One week after deciding *Wards Cove*, this Court granted certiorari, vacated the Court of Appeals' decision without opinion, and remanded the case to the Third Circuit for reconsideration in light of *Wards Cove*.

After carefully considering the teaching of *Wards Cove* and the extensive record in this case, the Court of Appeals again affirmed the disparate impact ruling in favor of the plaintiffs. USX now alleges that the Third Circuit flouted the instructions of this Court. Nothing could be further from the truth.

The Court of Appeals clearly understood and carefully honored *Wards Cove*. By insuring that the plaintiffs had identified subjective interviews and proved those interviews discriminated against blacks, and by determining that USX's attempted rebuttal was hollow, the Court of Appeals properly considered all pertinent *Wards Cove* issues. In reality, USX's dissatisfaction stems from the fact that the evidence proved it discriminated against blacks. There is nothing about this case that merits a writ of certiorari.

I. ON REMAND THE COURT OF APPEALS CORRECTLY DETERMINED THAT PLAINTIFFS HAD BOTH IDENTIFIED INTERVIEWS AS THE CHALLENGED EMPLOYMENT PRACTICE AND PROVED CAUSATION.

USX says that under *Wards Cove* "plaintiffs must *identify* the specific employment practice or practices they are challenging *and prove* that the identified practice or practices had a statistically significant adverse impact on a protected group." USX Petition at 11 (emphasis in original). USX also says that the Third Circuit, in its analysis on remand, "flagrantly disregarded" the mandate and "ignored the holding of *Wards Cove*." USX Petition at 10, 17.

USX's description of the two requirements that *Wards Cove* imposes upon a plaintiff is not controversial and merits no further discussion here. On the other hand, USX's description of the Third Circuit's analysis of the record below is plainly inaccurate. A fair review of the considerable evidence, briefs and court opinions in this case proves that the Court of Appeals properly applied

Wards Cove and that the plaintiffs (1) did challenge USX's use of subjective interviews and (2) did prove that USX disproportionately rejected qualified black job applicants at the interview stage.

A. Plaintiffs Focused Their Disparate Impact Attack On USX's Subjective Interviews.

In the two-week liability trial, the plaintiffs challenged USX's use of subjective interviews to winnow out qualified black applicants. Both the District Court and USX's trial counsel understood this. The claim of USX's current counsel that "plaintiffs never focused their attack on anything but the bottom line result," USX Petition at 15, is belied by the record.

In its remand opinion, issued only after USX, through briefs and extended oral argument, presented every *Wards Cove* challenge it could muster, the Court of Appeals confirmed that the plaintiffs' disparate impact attack was focused on subjective interviews.

> We also conclude that the class sufficiently identified the employment interview as a discriminatory hiring practice . . . . [T]he plaintiffs did present evidence isolating the interview as a discriminatory employment practice, as was recognized by both the district court and this court. The district court found that "the process by which [USX] divined who, among its applicants, were the best qualified was wholly subjective, consisting essentially of combining the gut reactions to the applicant of employees in the personnel office and one or more foremen in the plant." 570 F. Supp. at 269. On appeal, this court noted, and we still conclude, that "the class has sufficiently identified the interview process as

> one component of the USX hiring system that resulted in disparate hiring results." 843 F.2d at 1523.

(8a-9a) (footnote omitted).

The Court of Appeals' conclusion on remand was not based on fantasy. To illustrate, the plaintiffs' January 1983 post-trial brief said the following:

> Subjective criteria were used in an unsupervised manner by literally dozens of untrained plant foremen, operating with no regard for the few safeguards intended to prevent discriminatory hiring decisions.
>
> USS, in response to interrogatories, identified some twenty "factors" which it used to determine which of the applicants were to be hired. [Factors listed.] After a preliminary *interview* of applicants in the personnel office, USS sent the applicants to the operating department foremen or general foremen for *interviews*. Those *interviews* were conducted not only within the personnel office, but throughout the plant – by literally dozens of plant foremen, who could reject applicants for any reason they wanted.

Plaintiffs' Post-Trial Brief at 14-15 (emphasis added). Further:

> Company personnel certainly knew – by virtue of their monitoring of the DER [Daily Employment Report], which recorded the race of each day's hires – that only 17% of their hires were black. They also knew that 26% of their applications came from blacks; and that after preliminary screening some 25-30% of the applicants called in for *interview* were black. Yet when the 100 or more plant foremen had finished *interviewing* using the subjective hiring

> criteria, proportionately more blacks were being rejected than whites.

Id. at 50 (emphasis added). *See also* Tr. I 318, 488-490, 1563.

The District Court, too, understood that the plaintiffs were challenging USX's use of subjective criteria during interviews.

> It is also clear that the process by which USS divined who, among its applicants, were the best qualified was wholly subjective, consisting essentially of combining the gut reactions to the applicant of employees in the personnel office and one or more foremen in the plant.

LFF 110 (102a). Continuing:

> When making hiring decisions, USS's evidence was that its *interviewers* evaluated applicants using the following hiring criteria: education; work experience; attitude; initiative; personality; ability to take directions; alertness; intelligence; physical fitness (that is, physical restrictions); ability to communicate; military experience or training; vocational training; ability to meet work schedules; prior criminal record; familiarity with industrial or factory work; interest; prior employment history at Fairless Works; personal references; citizenship or alien status; having a relative in the USS work force; and age.

LFF 39 (79a) (emphasis added). And:

> Particularly when relatively vague subjective standards are given to a large number of individuals to be applied in whatever manner they see fit, with no systematic review to ensure fairness, the chances are great that conscious or unconscious racial bias on the part of some of those individuals will tinge the selection process.

(112a). *See also* LFF 31, 35-37, 43, 45, 50 and 52 (77a, 78a, 80a, 81a, 82a).

It is, therefore, clear that the plaintiffs targeted USX's subjective interviews. The Court of Appeals fully honored the "identification" requirement of *Wards Cove*. USX's assertion to the contrary is incorrect.[7]

B. Plaintiffs Proved That USX's Subjective Interviews Caused The Disproportionate Rejection Of Qualified Black Applicants.

The detailed evidence at trial showed that USX used a hiring process which involved a dozen steps, beginning with the submission of an application and ending with starting work. USS Trial Exhibit 19. To demonstrate that the disturbing racial disparity in USX's hiring occurred at step 10 – subjective interviews, the plaintiffs relied on thousands of USX employment documents, more than three days of testimony extracted from USX's own personnel officers, and the comprehensive testimony and written report of plaintiffs' expert statistician, as well as

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[7] The plaintiffs also challenged other aspects of USX's behavior, including the inappropriate destruction of crucial employment records, LFF 49 (81a-82a), the use of racial hiring quotas, LFF 53, 108 (83a, 100a), and giving preference to applicants with relatives in the USX work force. LFF 81 (92a). Nothing in *Wards Cove* says a Title VII plaintiff is limited to challenging only one aspect of an employer's business practices, and nothing in *Wards Cove* requires a plaintiff to prevail on every challenged issue in order to prevail on any. The evidence with respect to each challenged practice is to be considered separately. *See Wards Cove*, 109 S. Ct. at 2125.

effective cross-examination of USX's experts. The plaintiffs' proof also showed that the other eleven steps in USX's hiring process were neutral from a Title VII perspective and therefore did not affect the statistical conclusions drawn by the plaintiffs' expert.

Nonetheless, USX stubbornly contends to this Court, as it did unsuccessfully to the Court of Appeals, that the plaintiffs did not prove that USX's subjective interviews disqualified black applicants disproportionately.[8]

USX repeatedly claims that the plaintiffs' expert, Dr. Litwin, ignored all of the intermediate steps in USX's hiring process and considered only the first step (applications) and the last step (hires). USX Petition at 11, 13. This claim is misleading for two reasons. First, USX attempts to blink away the fact, as the plaintiffs' expert explained, that the company's destruction of documents made it impossible for him to perform a statistical analysis of several steps in USX's hiring process. Tr. I 816-17, 838-39.[9]

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[8] USX initially criticizes the plaintiffs for not introducing more detailed evidence comparing "the treatment of any applicant vis-a-vis another" or showing "individual instances of discrimination." USX Petition at 6 n.11. This argument is disingenuous for, as USX well knows, its employees refused in most instances to prepare the required reports of interviews which would have permitted the plaintiffs to expose specific disparities in USX's treatment of interviewees. Moreover, before the plaintiffs could obtain them, USX destroyed the few interview reports which were prepared. Both the District Court and the Court of Appeals made specific note of USX's improper destruction of interview documents. (22a).

[9] To illustrate the problem, USX's personnel chief testified that the Company did not retain documents showing who declined to be interviewed, who was interviewed, who

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Second, USX's assertion improperly ignores crucial evidence the plaintiffs did introduce through other witnesses, including knowledgeable USX personnel officers, which filled in the gaps left by the destroyed documents. When all of the plaintiffs' proof was considered, it was clear they had accounted for each of the twelve steps in USX's hiring process and proved that the interviews caused the disparity.

USX officials gave unchallenged testimony showing that throughout the class period the percentage of qualified blacks in the hiring process remained constant from the point of application (step 1) until the interview (step 10), and that nothing after the interviews (steps 11-12) had a disparate impact on blacks. The testimony also proved that blacks were disproportionately rejected during interviews.

Year	% of Applicants Who Were Black[10]	% of Interviewees Who Were Black[11]	% of Hires Who Were Black[12]
1972	20.3%	close to 30%	14.8%
1973	24.2%	close to 30%	16.1%
1974	21.4%	25%	13.1%
1978	29.1%	25-30%	19.1%
1979	26.4%	20-30%	19.1%

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declined offers, who failed physical exams, or who accepted offers but never appeared for work. Tr. I 253-55, 300-01, 475-76.

[10] *See* applicant flow table prepared by District Court. LFF 58 (85a).

[11] *See* liability trial testimony of Larry Edwards, the head of the personnel department at USX's Fairless plant. Tr. I 478-482. USX failed to retain corporate records which would more precisely reveal the identity and race of each interviewee. Tr. I 254-55, 300-01.

[12] *See* hiring table prepared by District Court. LFF 60 (86a).

The following step-by-step review demonstrates that the plaintiffs addressed each aspect of USX's hiring process.

Step 1: (Applications) - Throughout the class period, 26% of the persons who applied for unskilled laborer jobs were black. (26a). Both the District Court and the Court of Appeals concurred that those black applicants possessed the job qualifications USX required. (21a; 119a).

Step 2: (Log-in) - Two senior USX personnel department officials, Larry Edwards and Mabel Williams, testified that when USX logged in employment applications, blacks were treated the same as whites. Tr. I 234, 526-27. The plaintiffs' statistical expert confirmed that blacks were not adversely affected by clerical errors in logging in their applications. Tr. I 767-69. The District Court so found. LFF 25 (75a).

Steps 3-4: (Review and classification) - On occasion, USX preliminarily reviewed applications to find specially qualified persons to fill openings in the separate, skilled craftsman job category. Tr. I 220, 359; USS Trial Exhibit 19. Because proportionately more white applicants than blacks possessed craftsmen skills, LFF 79, 80 (92a), this culling did not reduce (and probably increased) the ratio of

qualified blacks left seeking unskilled USX laborer jobs.[13]

Step 5: (Filing) - The next step in USX's hiring process involved the ministerial act of filing applications. LFF 29 (76a); (22a). This did not eliminate black applicants from consideration.

Step 6: (Requisitions) - Similarly, the submission by foremen of requisitions to hire unskilled laborers did not involve a hiring decision and thus did not disparately eliminate black applicants from consideration. LFF 32 (77a); (22a).

Steps 7-9: (Applications pulled; reviewed for minority representation; interviews scheduled) - Nor were blacks disproportionately excluded when USX pulled applications from the files, reviewed them, and scheduled interviews. As the Court of Appeals observed:

> Clerks . . . were instructed to "maintain a good mix" of applicants in the ready file. USX's personnel supervisor testified that he

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[13] Periodically, USX also reviewed newly submitted applications to find applicants with a relative in the USX work force. (21a). USX moved those ahead to the interview stage. LFF 27 (76a). As the Court of Appeals noted, "the practice of giving priority to applicants with relatives occurred *prior* to the interview." (37a) (emphasis in original). Because 25-30% of the persons USX actually interviewed were black and 26% of those applying were black, the family preference did not disparately impact the blacks who were interviewed.

> had instructed clerks that 20-30% of those persons *ultimately interviewed* should be minorities.

(22a) (emphasis added). *See also* LFF 31 (77a); table *supra* at 14; and Tr. I 360-61, 380-81, 479-481.

USX screened the applicants scheduled for interview to see that they "had the factors that we [USX] were looking for and were . . . the best qualified we thought we could get." Tr. I 294. USX's top personnel officer, Larry Edwards, testified that those "factors" did not disqualify blacks disproportionately. Tr. I 434, 477-78, 487, 517. Moreover, Mr. Edwards also testified that while USX's files did not show the number or identity of persons who rejected an invitation to interview, Tr. I 475-76, "there was no predictable [racial] pattern." Tr. I 485.[14] Thus, the Court of Appeals said:

> We still believe that USX's contention that blacks "dropped out" of the hiring process at a higher rate than whites was properly discounted by both courts.

(9a). In other words, steps 7 through 9 did not have a disparate impact on blacks.

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[14] Contrary to USX's assertion, USX Petition at 6, the plaintiffs' expert studied the limited evidence that was available concerning those who did not report for interviews and found the number (about one-half dozen) too small to be statistically meaningful. Tr. I 816-17.

Thus, the plaintiffs proved that the percentage of qualified blacks (25%-30%) who cleared the first nine steps of USX's employment process and were interviewed (step 10) was consistent with the percentage of qualified blacks (26%) who applied for work (step 1). The plaintiffs also proved that the percentage of blacks hired (16%) was significantly smaller than the percentage of blacks interviewed. Finally, the plaintiffs proved that the remaining two steps following the interviews did not account for USX's disproportionate exclusion of blacks.

Steps 11-12: (Offers extended; start work) - At trial USX contended that it was not the interview that disproportionately excluded blacks. Rather, the company claimed that a fair percentage of offers were extended to blacks, but the disparity arose either because blacks declined job offers more frequently than whites, or failed to pass the physical exam. The District Court rejected that contention. LFF 126 (106a). The Court of Appeals affirmed, finding that USX's "assertion that a disproportionate share of black applicants voluntarily withdrew from the hiring process is not supported by the evidence of record." (51a-52a). Similarly, with respect to the physical examinations USX required offerees to pass, the District Court found that "failures did not occur in a racially disparate pattern." LFF 63 n.2 (87a).

Having established that it was the interviews (step 10) that screened out blacks, the plaintiffs introduced testimony from their expert to prove that USX's rejection of qualified blacks was statistically significant. Because none of the eleven other steps affected the ratios, they did not affect the expert's analysis. His hypothesis was that if there were no racial bias, "the fraction of blacks and the fraction of whites proceeding every step of the way" would be proportionate. Tr. I 838. The trial court observed that "the basic premise of Dr. Litwin's statistical analyses [was] that, absent discrimination on the basis of race, one would expect black applicants to be hired in roughly the same proportion as their representation in the applicant pool." LFF 109 (100a).

Relying on what the District Court found to be the most accurate data available, LFF 55 (83a), the plaintiffs' expert used four different statistical methods to test USX's hiring, adjusting each method to take into account variations that could have affected the accuracy of his conclusions. Dr. Litwin considered the minimal job qualifications involved, LFF 63 (87a), the possibility of clerical errors in recording an applicant's race, LFF 56 (84a), the fact that some people submitted more than one application, LFF 88 (94a), the possibility that some applications were missing, LFF 94 (96a), the length of time USX treated applications as active, LFF 70 (89a), and other factors.[15] Each of Dr. Litwin's methods of statistical

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[15] The plaintiffs' expert explained that because USX had destroyed vast employment records, it was impossible for him to analyze other steps in the USX hiring process such as exactly how many offerees failed physical exams, Tr. I 817, or the

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analysis yielded standard deviations of greater than -4, and the overall shortfall of black hires exceeded -14 standard deviations. He, therefore, concluded that the racial disparity was certainly not due to chance. The trial court found plaintiffs' expert to be "a highly qualified statistician" whose "presentation and conclusions were credible." LFF 84 (93a).[16]

Ironically, USX's own statistical evidence at trial buttressed the plaintiffs' proof. As the District Court noted, "two defense experts . . . confirmed that the analyses [plaintiffs' expert] performed in relation to the overall P & M applicant pool were appropriate, and that the results he obtained were reliable, given his data and

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specific traits of those whose applications were destroyed by USX, Tr. I 838-39. In *Bazemore v. Friday*, 478 U.S. 385, 400 (1986), this Court ruled that a plaintiff's statistical proof need not account for "all measurable variables thought to have an effect" on the employer's decision. And of course, an employer's improper destruction of valuable records cannot be used as criticism of the plaintiffs' expert. In any event, here the plaintiffs did account for all other steps through the testimony of USX employees.

[16] Although USX's appeal of the trial court's liability decision did not challenge the statistical conclusions plaintiffs' expert reached, (27a n.7), USX now argues that plaintiffs' statistical case was flawed because it only eliminated chance as the cause of the disparity. USX Petition at 13. Where tests of statistical significance eliminate chance as a possible explanation for a disparity in hiring, this Court has said that it is appropriate to conclude that the differences are attributable to discriminatory practices. *See Hazelwood School Dist. v. United States*, 433 U.S. 299, 308-09 n.14 (1977).

assumptions."[17] LFF 84 (93a). Especially damaging to USX was the fact that its leading expert, Dr. Welch, conceded that in USX's hiring system "being white gave an applicant an 'edge,' that is, an increased probability of being hired." LFF 119 (104a).

Thus, by identifying interviews as an employment practice they were challenging, and by proving through their expert and the mouths of USX's own employees and experts that the disparity in black hiring was caused by USX's use of subjective interviews, the plaintiffs made out a proper case of disparate impact against USX under *Wards Cove*.

After considering the detailed record and all of USX's arguments on remand, the Court of Appeals concluded that the class had:

> established that the interview had a "significantly disparate impact" on the employment opportunities for black and white applicants.

(8a). And further, that:

> The evidence establishes that the subjective interviews had a significantly disparate impact on blacks, as the percentage of successful black interviewees was significantly less than the overall percentage of successful interviewees.

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[17] There was really no way for USX to mount a legitimate attack on plaintiffs' statistics. Unlike the small sample in *Watson*, the statistics here were based on almost 50,000 applications. And, unlike the skilled positions sought in *Wards Cove*, there were no meaningful USX job qualifications for laborers, so the plaintiffs' statistics were not tainted by individuals unsuited for the job.

(9a). In so doing, the Court of Appeals paid full respect to the requirements of *Wards Cove*.

II. ON REMAND THE COURT OF APPEALS CORRECTLY HELD THAT USX FAILED TO PRODUCE ANY SUBSTANTIAL EVIDENCE THAT THERE WAS A BUSINESS JUSTIFICATION FOR ITS DISCRIMINATORY INTERVIEW PRACTICES.

A. The Third Circuit Understood And Followed This Court's Distinction Between Burdens Of Production And Of Persuasion.

In *Wards Cove* this Court said that once a prima facie case has been established, "the employer carries the burden of producing evidence of a business justification for his employment practice." 109 S. Ct. at 2126. As to any proffered justification, the question is whether the challenged hiring practice "serves, in a significant way, the legitimate employment goals of the employer." *Id.* at 2125-26. The court must engage in

> a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices.

Id. at 2126.

The *Wards Cove* ruling signaled a change in the allocation of burdens of proof in disparate impact cases. The employer must now "produce evidence" of justification, but no longer needs to prove that its practice is essential or indispensable. The burden of persuasion remains always with the plaintiff. 109 S. Ct. at 2126.

The certiorari petition incorrectly argues that the Third Circuit disregarded *Wards Cove* and imposed upon USX the "burden of proof" or "burden of persuasion" regarding business justification. USX Petition at 17-22. In fact, the Third Circuit understood that USX bore only a burden of production, and properly held that USX was unable to satisfy even that burden.

At trial USX offered two theories why its subjective interviews disproportionately excluded blacks: (1) "the class members' qualifications were less than those of the applicants ultimately hired; and (2) . . . a greater proportion of black applicants voluntarily 'dropped out' of the hiring process . . . . " (49a). Both the District Court and the Third Circuit concluded that these excuses were "wholly without merit." (50a).

Revisiting this question on remand, the Court of Appeals' analysis was again correct and to the point:

> Finally, although *Wards Cove* may have reduced the employer's burden of showing a legitimate, non-discriminatory reason for the challenged practices, we perceive no reason to disturb the district court's and our own, prior rejection of USX's assertion that the subjective criteria enabled it to identify the "best qualified" applicants for the essentially unskilled positions. 570 F. Supp. at 275-76; 843 F.2d at 1529. We still believe that USX's contention that blacks "dropped out" of the hiring process at a higher rate than whites was properly discounted by both courts. 570 F. Supp. at 271; 843 F.2d at 1529-30. Although *Wards Cove* may have relaxed the employer's burden to rebut the plaintiff's *prima facie* case, we do not read the decision as requiring us to accept at face value an employer's explanations of the adverse impact

> of its hiring practices on blacks. As the *Wards Cove* Court stated, "[a] mere insubstantial [business] justification . . . will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices." 109 S. Ct. at 2126.

(9a-10a).

The Third Circuit's reasoning tracks *Wards Cove* precisely. It comports with this Court's consistent view that, to rebut a prima facie case, an employer must offer evidence having some substance. As stated in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981), the employer's "explanation of its legitimate reasons must be clear and reasonably specific."

While the plaintiffs always bear the ultimate burden of proof, an employer cannot rebut a prima facie case merely by uttering some baseless theory. Plausible "evidence" is needed.[18] If the employer's rebuttal excuse is so weak that it collapses from its own weight, or is shown through cross-examination to be a "mere insubstantial

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[18] The courts below required no more of USX. The company's assertion, USX Petition at 17, that it was required to "prove" that its excuses were valid is not supported by the record. The standard employed by the District Court, citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), was that USX had "to explain" or make a "showing" that its subjective interviews served a legitimate business purpose. (116a). In *Wards Cove*, this Court pointed to the identical passage in *Griggs* in describing the employer's evidentiary burden. 109 S. Ct. at 2125-26. Similarly, the Third Circuit merely required USX to "articulate [ ] a sufficient non-discriminatory reason to rebut the inference that its hiring practice was discriminatory." (49a). USX was never required to shoulder the ultimate burden of proof.

justification," it is correct to conclude that the employer has neither satisfied its burden of production nor rebutted the prima facie case. When this failure occurs, the plaintiffs have established liability.

B. USX Failed To Produce Any Substantial Justification For Its Discriminatory Practices.

1. The "best qualified" excuse was baseless.

USX's first rebuttal argument was that although there were no meaningful job requirements, the company made substantive evaluations of laborer applicants and found that white applicants were better qualified than black applicants. This argument fails the test of *Wards Cove* because USX was unable to back it up with *any* plausible evidence. As the Court of Appeals concluded, "[t]he record is completely devoid of evidence supporting this contention." (50a).

Indeed, USX's own witnesses scuttled its "best qualified" claim. USX introduced a study performed by its expert, Dr. Finis Welch, in an attempt to show that the company's subjective hiring reflected differences in applicant qualifications rather than racial bias. The District Court described Dr. Welch's report this way:

> If the Winner/Loser study revealed anything about what [USX] looked for in its applicants, it showed that [USX's] conduct was bizarre. Dr. Welch found that an applicant who had spent 7 of the past 10 years working as a manufacturing operative had no better chance of hire at [USX] than a person who had never worked a day in his life. He found that an applicant with one year of experience as an assembly line worker in an ice cream plant was

> *more* likely to be hired by [USX] than an applicant with 10 years of experience as a steel mill laborer. He found that applicants who had a college degree or some college training had a reduced chance of hire at [USX], as did applicants who had clerical experience. Ironically, he found that being white gave an applicant an "edge," that is, an increased probability of being hired.

LFF 119 (104a) (emphasis in original). The trial court concluded that:

> The Winner/Loser study did not show any relationship between the variables Dr. Welch measured and successful performance on P&M jobs. It did not attempt to determine whether the multitude of criteria [USX] used were job-related. Nor did it purport to show that blacks were less qualified than non-blacks, under [USX's] or any other criteria.

LFF 121 (105a).

Against this record, it is disturbing that USX now asserts that the District Court made "findings and conclusions that USX's use of subjective criteria to obtain the best-qualified employees was justified." USX Petition at 20-21. Quite to the contrary, the District Court concluded that in rebuttal USX had done nothing more than "invoke the 'best qualified' standard" and had failed to make even a minimal "showing" that the criteria it used to select the "best qualified" correlated with job performance. (116a).

USX emphasizes the trite statement of its expert, Dr. Haworth, that it is a reasonable business practice for an employer to hire the best qualified applicants. USX Petition at 20-21. However, USX ignores the fact that her

observation was entirely in the abstract; it did not describe USX's actual practice. The District Court found that:

> Dr. Haworth did not address, however, whether the defendant accurately measured the extent to which applicants were qualified, or whether its system was designed to ensure fair and racially neutral application of those criteria. The evidence, on the contrary, was that application of defendant's "best qualified" criteria was left to up to 100 plant foremen, general foreman, and personnel office interviewers and clerks; that no systematic efforts were made to train these individuals in neutral application of the criteria, or to review the fairness of their decisions; and that, under the name of applying the "best qualified" standard, each individual decision-maker essentially simply consulted his or her "gut level" reaction to an individual applicant. Moreover, the one safeguard against discrimination that was built into the system – the requirement that a written record be kept of the reasons for an applicant's rejection – was largely ignored.

(116a-117a). Thus, the District Court obviously did not conclude that USX's use of subjective criteria "was justified." USX Petition at 20. Indeed, the District Court found that there was

> no evidence from which I could reasonably conclude that blacks, on the average, are less qualified to be laborers in steel mills than whites, and that defendant's selection process fairly determined this to be so. To the extent defendant's argument suggests I should take judicial notice of the inferior qualifications of blacks, it is morally and legally offensive.

(115a-116a).

The Third Circuit, too, concluded that "USX articulated no logically comprehensible standard that it used to identify applicants who were 'better qualified' to do the jobs for which USX was hiring"; that "the evidence that was presented by USX negated the [best qualified] contention"; and that "the [USX] hiring process was unseemly." (50a-51a).[19] The Court of Appeals' conclusion that "[t]he record is completely devoid of evidence supporting this [best qualified] contention," (50a), was both accurate and in full keeping with *Wards Cove*.

2. The company's "drop out" theory was properly rejected.

USX's second rebuttal claim was that over the full class period a disproportionately large number of black applicants voluntarily withdrew from the hiring process. USX introduced this theory through testimony from Robert Talley, a low-level employee with no statistical expertise, who claimed to have reviewed some hiring data for small segments of the years 1973 and 1974. On the basis of this shallow testimony USX claimed that throughout the decade it had offered blacks a statistically proportionate number of "job opportunities."[20]

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[19] As Justice Blackmun's concurring opinion in *Watson* noted, a prima facie case cannot be rebutted by "the bald assertion that a purely discretionary selection process allowed [it] to discover the best people for the job, without any further evidentiary support." 487 U.S. at 1009.

[20] The predicate of this claim is that a proportionate share of USX's laborer job offers went to black applicants (25% to

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The District Court deemed Talley's testimony "unreliable" because it was contradicted by USX's head of personnel, Larry Edwards, who said that "there were no reliable [USX] records from which rates of applicant drop-outs or failures of physical exams could be determined." LFF 127 (106a). Edwards also testified that in his experience the "phenomenon of 'dropping out' during the interviewing process, or after a job offer had been extended, occurred 'across the board,' and . . . did not occur disproportionately often among blacks." *Id.* The trial court further cited testimony from the plaintiffs' expert which exposed the basic flaws in Talley's theory. LFF 130 (107a-108a).[21]

The District Court therefore concluded that USX's "drop out" theory "has not explained the statistically significant shortfall in black hiring for entry level P & M jobs . . . . " LFF 132 (108a). The Third Circuit agreed that the "drop out" excuse was "not supported by the evidence of record." (51a-52a). Indeed the Court of Appeals characterized USX's theories as "pretextual rationalizations for discriminatory hiring." (52a).

Thus, USX failed in the rebuttal stage to "produce evidence" to explain its biased hiring practices. It offered only an "insubstantial justification," which satisfied

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30%), which is inconsistent with USX's first rebuttal excuse that it hired only the "best qualified" and that, as a result, fewer black applicants (16%) were hired.

[21] This finding of fact exposes the falsehood in USX's assertion that "at no point [during trial] did they [plaintiffs] present any evidence . . . of the dropout rate among applicants." USX Petition at 7.

neither the requirements of *Wards Cove*, 109 S. Ct. at 2126, nor the courts below. USX's failure to rebut was not because of any legal error by either the District or Circuit Court. It was because USX had no legitimate excuse for its biased hiring.[22]

CONCLUSION

The Court of Appeals, on remand, properly followed *Wards Cove* and correctly held, after reviewing the extensive record, that the plaintiffs proved that USX's subjective interviews discriminated against thousands of black applicants. There is no reason for this Court to become further immersed in the factual details of this case. The writ should be denied.

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[22] Because USX did not rebut the prima facie case, there is no need to examine the *Wards Cove* issue of whether plaintiffs could prove that another employee selection device, lacking disparate impact on blacks, would equally serve USX's legitimate employment goals. USX's criticism that plaintiffs "presented absolutely no evidence of other selection devices . . . ", USX Petition at 7, is misplaced.